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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 536

CAROLINE MOSS, aka GIGI MARTINI,

Petitioner,

vs.

CALIFORNIA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

E. A. KANAREK,
1416 Victory Boulevard,
Van Nuys, California.

REX A. MINTER,
225 Santa Monica Boulevard,
Santa Monica, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its Order of December 18, 1961, denying the Petition for Writ of Certiorari, 368 U. S. ...., and that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles in the above-entitled case as prayed for in the petition filed November 6, 1961, herein.

Reasons for Granting Rehearing and Issuing the Writ.

Two very recent decisions of the California Supreme Court (*In re Carol Lane* on Habeas Corpus, Criminal 6929, December 21, 1961 and *In re Albert J. Harris* on Habeas Corpus, Criminal 6962, November 22, 1961, 56 A. C. 898) undisputably show that prosecution of

Petitioner under Los Angeles Municipal Code Section 41.02(b) constituted denial of both equal protection of the laws and due process of law which are guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner points out, in Petition for Writ of Certiorari, the denial of these fundamental Fourteenth Amendment guarantees; the *Lane* decision was rendered (December 21, 1961) after the date of the denial of the Petition which occurred on December 18, 1961; the *Harris* decision was rendered (November 22, 1961) after the date the Petition was filed with this Court, November 6, 1961.

The *Lane* decision refers to Penal Code Section 314 (Appendix p. 1) which is derived from what was numbered Penal Code Section 311 (See Petition for Writ of Certiorari, Appendix A, p. 4) prior to September 15, 1961. The Lane charges, which were before the California Supreme Court only on collateral attack (habeas corpus) after judgment and appeal, resulted in prosecution and appeals, through denial of Petition for Rehearing, all completed prior to September 18, 1961 (see Appendix pp. 2, 3).

The same completion prior to September 15, 1961 applies in the *Harris* case (see Appendix p. 4), and in the case of Petitioner here (see Petition for Writ of Certiorari, p. 1). Mr. Roger Arnebergh, City Attorney for the City of Los Angeles, by way of an official directive of his office directed to the Chief of Police of the City of Los Angeles (see Appendix p. 4) by date of December 27, 1961, states, referring to the *Lane* decision, *supra*, as follows:

> "Because of the general language of this decision and the broad scope of its holding, it is

> my opinion that the following sections of the Municipal Code are now to be considered invalid and should no longer be enforced:"

Section 41.02 Indecent Shows is included in the list which follows. (See Appendix p. 6.)

In pursuance of the aforementioned directive and the *Lane* case, *supra*, the city attorney's office under Mr. Arnebergh has moved for and obtained the dismissal of at least two complaints in the Los Angeles Municipal Court charging violation of aforesaid Section 41.02(b): *People v. Nancy Carol*, No. 146,937, and *People v. Sonia McCallister*, No. 146,946. These dismissals occurred December 29, 1961. (See Appendix p. 8.)

It was for alleged violation of subsection (b) of this code section that Petitioner Caroline Moss was prosecuted and judgment involving a severe jail sentence rendered against her (see Petition for Writ of Certiorari, Appendix B).

The City Attorney now takes a position diametrically opposite to the position he took at pages 8 and 9 of his "Brief of Respondent in Opposition to Granting a Writ of Certiorari" in connection with the question of whether or not the Municipal Ordinance, Subsection (b) of Section 41.02 of the Los Angeles Municipal Code, has been preempted. Since there is no question but that preemption has occurred, it is a violation of due process of law and equal protection of the laws under the 14th Amendment to the United States Constitution for petitioner Caroline Moss, an individual who has had no previous involvement with the law, to have to suffer the harsh judgment aforementioned. The Petition for Writ of Certiorari, at pages 23 *et seq.*, points out this preemption or occupation of the field.

Besides the contemporary community standards considerations petitioner Caroline Moss presented in her Petition for Writ of Certiorari (pp. 18 and 19 of said Petition), Petitioner was not allowed by the trial court even to attempt to establish Frank Sorge as an expert in the field of burlesque [R. T. 373:9, *et seq.*].* although as shown in said Petition at the bottom of page 25 thereof, Sorge had seen the dance of petitioner many, many times, and was in the burlesque business. Although the trial court held that expert testimony was not permissible [R. T. 374:3 *et seq.*] concerning Petitioner's approximately 15 minute dance [R. T. 352:25 *et seq.*; 250:20, 545:19 *et seq.*], the *Harris* case, *supra*, holds that expert testimony concerning contemporary community standards is admissible (using *Roth v. United States*, 354 U. S. 476) and that it is a denial of due process for the trial court not to allow defendant to prove contemporary community standards. It logically follows, further, that showing only three and three-quarter minutes of an approximate fifteen minute performance to the jury is an independent basis of denial of due process since Roth decrees that the performance taken as a whole, must be judged by the jury (see Petition for Writ of Certiorari, p. 12 *et seq.*).

Thus, in conformity with this Court's Rule 58(2) there are shown, *supra*, grounds "confined to intervening circumstances of substantial or controlling effect," (the *Lane* and *Harris* decisions, and the City At-

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*Since this Court has the only copy of the Clerk's Certified Transcript of Record (referred to in the Petition for Writ of Certiorari as CCTR), reference here will be to the page numbers of the Reporter's Transcript.

torney's official directive and motions for dismissal in view of the *Lane* decision) and "substantial grounds available to petitioner although not previously presented" (the denial of the trial Court of Petitioner's request to establish a foundation so that expert testimony concerning contemporary standards could be offered) such that this Court is respectfully requested to grant this Petition for Rehearing.

Conclusion.

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Respectfully submitted,

I. A. KANAREK,
REX A. MINTER,
Attorneys for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

I. A. KANAREK,
REX A. MINTER,
Attorneys for Petitioner.

APPENDIX.

CHAPTER 8. INDECENT EXPOSURE, OBSCENE EXHIBITIONS AND BAWDY AND OTHER DISORDERLY HOUSES.

Sec. 314 Lewd or obscene conduct, indecent exposure; obscene exhibitions; punishment.

Every person who willfully and lewdly, either

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year. (Added Stats. 1961, c. 2147, p. ..... Sec. 7.)

Derivation: Former section 311. Enacted 1872. Amended by Code Am. 1873-74, c. 614, p. 429, Sec. 25; Stats. 1931, c. 759, p. 1597, Sec. 1; Stats. 1949, c. 1003, p. 1848, Sec. 1; Stats. 1952, 1st Ex. Sess., c. 23, p. 381, Sec. 4.

In the Supreme Court of the State of California, in the case of *In re Carol Lane* on Habeas Corpus, Criminal 6929, are certified copies of the Official Court Docket of the Municipal Court of the Los Angeles Judicial District for each of the two allegations of violation of Section 41.07 of the Los Angeles Municipal Code: Complaints 134,457 and 138,148 of said Municipal Court each embody one of the allegations.

Municipal Court No. 134,457, indicates an entry in the docket dated December 29, 1960 which states, *inter alia,* "Complaint filed sworn to by H. A. Spearman charging the the (sic) Defendant with having on December 28, 1960 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to wit:

VIOLATION OF SECTION 41.07 L.A.M.C. Count I"

On March 16, 1961, the docket reveals Carol Lane was adjudged guilty in the Trial Court.

In Municipal Court No. 138,148, People of the State of California v. Carol Ann Lane, a February 15, 1961 entry to said docket provided, *inter alia,* "Complaint filed sworn to by H. A. Spearman, charing (sic) the Defendant with having on February 14, 1961 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to wit: VIOLATION OF SECTION 41.07 L.A.M.C. Count I."

On March 16, 1961, the docket reveals Carol Lane was adjudged guilty in the Trial Court.

The Official Register of Actions of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles reveals that the appeal in Municipal Court case No. 134,457 has the Appellate Department Number CRA 4653, and the appeal of Municipal Court Case No. 138,148 has the Appellate Department Number CRA 4654. Said register of actions reveals that in the Appeal from the Municipal Court, in each case, on June 14, 1961 the trial court judgment was affirmed; said register of actions reveals further that in each of the cases the petition for rehearing was filed on June 16, 1961 and that in each case the petition for rehearing was denied on June 19, 1961.

In the Supreme Court of the State of California, in the case of *In re Albert J. Harris* on Habeas Corpus, Criminal 6962, 56 A. C. 898, is a certified copy of the Official Court Docket of the Municipal Court of the Los Angeles Judicial District embodying the two counts before the California Supreme Court in Criminal 6962, *supra*. Complaint 109,424 of said Municipal Court embodies the aforesaid two counts.

In Municipal Court No. 109,424, *People of the State of California v. Albert J. Harris*, a May 16, 1961 entry to the aforesaid docket provides, *inter alia:*

> "Order denying rehearing from the Appellate Department of the Superior Court, filed."
>
> "Appeal by Defendant from Judgment is affirmed."

OFFICIAL DIRECTIVE OF MR. ROGER ARNEBERGH, CITY ATTORNEY, CITY OF LOS ANGELES.

December 27, 1961

Mr. William H. Parker,
Chief of Police,
Police Administration Building,
Los Angeles 12, California.

Dear Chief Parker:

The Supreme Court of the State of California has just rendered its decision in the above case. In the majority opinion the Supreme Court has held that Section 41.07 of the Los Angeles Municipal Code is in conflict with the State law and therefore void. The decision, however, is much broader in scope than merely holding such section to be invalid.

The court states that the sole question necessary for it to determine is:

> "Has the State pre-empted the field of regulating the criminal aspects of sexual activity and prostitution?"

And the answer to that question as given by the majority decision of the Supreme Court is:

"Yes."

The majority opinion further states:

"An examination of the Penal Code shows clearly that the State has occupied the field with regard to the criminal aspects of sexual activity and prostitution and has provided appropriate penalties in each instance. . . .

"Although living in a state of cohabitation and adultery is prohibited (Pen. Code, Sec. 269a), neither simple fornication or adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state (citing cases).

"It is therefore clear that the Legislature has determined by implication that such conduct shall not be criminal in this state. (citing cases). . . .

"Accordingly, a city ordinance attempting to make sexual intercourse between persons not married to each other criminal is in conflict with the law and is void."

Because of the general language of this decision and the broad scope of its holding, it is my opinion that the following sections of the Municipal Code are now to be considered invalid and should no longer be enforced:

Municipal Code Section
and Subject Covered

41.01—Indecent writings, etc.

41.01.1—Possession of indecent writings, etc.

41.02—Indecent shows.

41.05—Offering.

41.06—Soliciting.

41.07—Resorting

41.08—Procuring.

41.09—Resorting for money.

41.10—Renting room for resorting.

41.11—Use of vehicle for prostitution.

41.11.1—Visiting place of prostitution.

41.11.2—Loitering by immoral person.

41.12—Indecent advertising.

41.13—Indecent motion picture.

Your office, of course, is familiar with Penal Code Sections having any applicability.

We, of course, are very concerned over the implications of this decision with respect to other fields of criminal law. As the dissenting opinion states:

"As an example, one area in which local additional regulations have frequently been upheld is in the regulation of gambling. (citing cases). I do not suppose that the majority of this court intends to overrule the cases upholding additional local restraints upon gambling; but one could as easily employ the technique of the majority opinion to reach the conclusion that all

such local regulations of gambling are invalid, as follows: 'The Legislature has legislated extensively in the field of gambling (citing Penal Code Secs.). It is clear that it has thereby occupied the field and has determined by implication that any other form of gambling not prohibited by state law shall not be criminal in this state.'

"This court by this decision is, in my opinion, practically wiping out the constitutional grant of power to local legislative bodies contained in article XI, Section 11, because once we abandon the heretofore settled rule that the local bodies can adopt additional regulations to those provided by state law there will be very few areas left, outside of strictly municipal affairs, in which any local regulations can operate."

It is quite possible, as indicated in the dissenting opinion, that municipal regulations against gambling, such as Section 43.01, may ultimately be determined by the Supreme Court to be in conflict with state law. Nevertheless, in view of the fact that our city gambling ordinances were not specifically involved in this case, it is my advice that you continue to enforce our municipal ordinances in the field of gambling.

Sincerely yours,

ROGER ARNEBERGH,
City Attorney.

The Official Court Docket of the Municipal Court of the Los Angeles Judicial District reveals:

(1) In *People of the State of California v. Nancy Carol*, charged with violation of Los Angeles Municipal Code Section 41.02(b), No. 146,937, under date of December 29, 1961:

> "Complaint dismissed on motion of Deputy City Attorney. (*People v. Lane.*)"

(2) In *People of the State of California v. Sonia McCallister*, charged with violation of Los Angeles Municipal Code Section 41.02(b), No. 146,946, under date of December 29, 1961:

> "Complaint dismissed on motion of Deputy City Attorney. People desire not to prosecute in view of *People v. Lane.*"